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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOSE MANUEL LOPEZ,

Plaintiff and Appellant,

v.

ALISHIA MARIE HERNANDEZ,

Defendant and Respondent.

G052853

(Super. Ct. No. 30-2013-00628642)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Linda S. Marks, Judge. Affirmed.

Jose Manuel Lopez, in pro. per., for Plaintiff and Appellant

No appearance for Defendant and Respondent.

\* \* \*

Jose Manual Lopez appeals from a judgment dismissing his complaint against Alishia Marie Hernandez because it failed to state a cause of action for damages. He argues the court was obligated to enter judgment in his favor because Hernandez defaulted.

In dismissing Lopez’s complaint, the trial court acted in accordance with its obligation to “act as gatekeeper [in the default process], ensuring that only the appropriate claims get through.” (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868.) In this case, Lopez sought to recover damages stemming from Hernandez’s allegedly defamatory report of an alleged crime to police. As the trial court recognized, such reports are absolutely privileged and cannot support a claim for damages — even if false. Consequently, the trial court was correct to dismiss the complaint rather than enter a judgment for damages in favor of Lopez. Accordingly, we affirm the judgment of dismissal.

## FACTS

The record supplied by Lopez in support of his appeal is thin, but with the addition of his complaint, is adequate to assess his appeal on the merits.<sup>1</sup>

Lopez filed his complaint in February 2013. He alleged Hernandez defamed him by reporting to an officer of the Santa Ana Police Department that he raped her. He further alleged he was interviewed by the police in connection with the “false allegations,” and that he was held in custody for 64 days before being released with no charges filed.

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On our own motion, we order the record be augmented to include a copy of Lopez’s complaint. Although Lopez has objected to this augmentation order, apparently believing we should instead augment our record to include all documents filed in the superior court, we overrule his objection.

Lopez alleged that as a result of Hernandez's false allegation and the time he spent in jail, he suffered lasting trauma, as well as the loss of liberty, property and wages. He alleged "noneconomic damages" of "approximately" \$100,000 as of the filing of the complaint. In addition to the \$100,000, Lopez also alleged "economic and noneconomic losses for the sixty four days he spent in jail" in the amount of \$93,696.

Hernandez filed no response to the complaint and Lopez made several efforts to obtain entry of her default. On September 19, 2014, Lopez filed a request for entry of a court default judgment against Hernandez, along with several supporting documents. Eleven days later, on September 30, 2014, the court issued an order to show cause re: dismissal, setting a hearing date in December 2014. The order to show cause was continued to January 2015, and the court ordered the case dismissed with prejudice.

As the court explained in its dismissal order, it had "undertaken a substantive review of the relief sought in the complaint" and "[a]fter considering Civil Code § 47 and the case of *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, the court concludes that there can be no tort liability (defamation of character, libel, and slander) imposed for statements made when a citizen contacts law enforcement personnel to report suspected criminal activity on the part of another person. Such statements are considered privileged pursuant to Civil Code § 47 [subdivision] (b)." Due to the privileged nature of the alleged defamatory statements made by Hernandez, the court concluded Lopez "could not prevail on this suit."

The court issued its formal order of dismissal on September 29, 2015. On November 19, 2015, Lopez filed his appeal from the "court order dismissal with prejudice."

## DISCUSSION

Lopez contends the trial court was required to enter judgment in his favor because Hernandez defaulted on the complaint. He claims Hernandez conceded her culpability by failing to answer. But that is not the case. While a default effectively admits the *factual allegations* of a complaint, it does not concede either the legal sufficiency of a cause of action or the ultimate issue of liability.

In *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267 (*Kim*), this court set forth “the basic guidelines for analyzing the legal effect of a default.” (*Id.* at p. 281.) We explained that “[s]ubstantively, “[t]he *judgment by default* is said to ‘confess’ the material facts alleged by the plaintiff, i.e., the defendant’s failure to answer has the same effect as an express admission of *the matters well pleaded in the complaint*.” [Citation.] The ‘well-pleaded allegations’ of a complaint refer to “‘all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.’” (*Ibid.*)

“But that is all the default does. There is no penalty for defaulting. ‘A defendant has the right to elect not to answer the complaint. [Citation.] Although this may have been a tactical move by defendant, it is a permissible tactic.’” (*Kim, supra*, 201 Cal.App.4th at pp. 281-282.) “And if the well-pleaded allegations of the complaint do not state any proper cause of action,” the plaintiff is not entitled to any judgment in his or her favor. (*Id.* at p. 282.)

Moreover, as we explained in both *Kim*, and in *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, “[i]t is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not in plaintiffs’ interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the

court to act as gatekeeper, ensuring that only the appropriate claims get through.’” (*Kim, supra*, 201 Cal.App.4th at p. 272; *Heidary*, at p. 868.)

That is exactly what the court did here when it “undert[ook] a substantive review of the relief sought in the complaint” in response to Lopez’s request for entry of a default judgment. In its review, the court noted that Lopez’s complaint specifically alleged that Hernandez’s defamatory claim of rape, which led to his 64-day incarceration and caused him to incur other damages, had been made to a police officer. The court then relied on the Supreme Court’s opinion in *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 365 (*Hagberg*), which holds that the absolute privilege set forth in Civil Code section 47, subdivision (b), applies to any communication made to law enforcement personnel reporting suspected criminal activity, even if made in bad faith or with malice.

In *Hagberg*, the Supreme Court stated that the litigation privilege “serves the important public policy of assuring free access to the courts and other official proceedings. It is intended to “assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing.”” (*Hagberg, supra*, 32 Cal.4th at p. 360, italics omitted.) It then “explained that both the effective administration of justice and the citizen’s right of access to the government for redress of grievances would be threatened by permitting tort liability for communications connected with judicial or other official proceedings.” (*Id.* at pp. 360–361.) Consistent with that purpose, the Supreme Court reasoned that the litigation privilege also “protect[s] communications to or from governmental officials which may precede the initiation of formal proceedings.” (*Id.* at p. 362.) Consequently, the Supreme Court concluded that when a person “contacts law enforcement personnel to report suspected criminal activity on the part of another person . . . such statements are privileged pursuant to Civil Code section 47, subdivision (b) . . . , and can be the basis for

tort liability only if the plaintiff can establish the elements of the tort of malicious prosecution. (*Id.* at p. 355, fn. omitted.)

Based on *Hagberg*, the court acted correctly in dismissing Lopez’s complaint because it alleged only that Hernandez had engaged in a *privileged* communication with the police officer. Consequently, the complaint failed to state a cause of action for defamation grounded on either libel, which is defined as “a false *and unprivileged* publication by writing, printing, picture, effigy, or other fixed representation to the eye” (Civ. Code, § 45, italics added), or slander, which is defined as “a false *and unprivileged* publication, orally uttered.” (Civ. Code, § 46, italics added.)

On appeal, Lopez does not acknowledge the trial court’s reliance on *Hagberg*, nor does he explain why it is incorrect on the merits.<sup>2</sup> Instead, he asserts the court erred in dismissing his complaint because Hernandez’s crime report against him amounted to “hatred speech” in violation of Civil Code sections 51.7 and 52.

Civil Code section 51.7, subdivision (a) states, in pertinent part, that “[a]ll persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics.” And Civil Code section 52, subdivision (a) states, in pertinent part, that “[w]hoever denies, aids or incites a denial, or

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Lopez’s appellate brief does cite *Hagberg* once, as part of a string of citations, but his purpose in doing so is difficult to discern. At oral argument, Lopez relied on *Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476, a case which held that a false report to the police about a suspected crime was subject only to the *qualified privilege* under Civil Code section 47, subdivision (c). But this holding of the *Fenelon* court was disapproved by the California Supreme Court in *Hagberg*. (*Hagberg*, *supra*, 32 Cal.4th at pp. 366-369.)

makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense . . . .”

However, we need not address the theoretical merit of a claim against Hernandez based on either statute because Lopez did not purport to state any such claim in this case. Neither statute was even mentioned in his complaint, which was based exclusively on allegations of libel and slander. And as we have explained, the complaint failed to state a cause of action for either. Consequently, dismissal was proper.

#### DISPOSITION

The judgment is affirmed. Because Hernandez did not appear in this appeal, no costs are awarded.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

FYBEL, J.